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No. 06-105

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In the Supreme Court of the United States

CHARLES C. SAUVAGE, PETITIONER

v.

MICHAEL CHERTOFF, SECRETARY OF HOMELAND SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should vacate the judgment and remand for reconsideration in light of *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006), when the magistrate judge found that petitioner failed to prove a discriminatory or retaliatory motive, and petitioner has failed to challenge that finding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter*, but is *reprinted in* 178 Fed. Appx. 932. The order of the district court (Pet. App. 3a-41a) is reported at 413 F. Supp. 2d 1289.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2006. The petition for a writ of certiorari was filed on July 20, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Charles C. Sauvage, Jr. joined the United States Customs Service (Customs) in 1987. Pet.

App. 4a. By 2000, at the age of 53, he had become an Associate Special Agent-in-Charge (SAIC) of the Customs office in Miami, Florida. *Id.* at 4a, 6a.

In March 2000, the Commissioner of Customs decided that in order to reduce complacency within the agency, he would transfer a number of senior agents to different field offices. Pet. App. 5a, 27a. The ability to move is a condition of employment for Customs agents. *Id.* at 5a. After discussions with various executive directors and local SAICs, the Customs Service's Office of Investigations prepared a list of 12 agents for transfer, including petitioner. *Ibid.* Petitioner had been experiencing difficulties working with his supervising SAIC, and the list recommended that he be transferred to a position as an Associate SAIC in Los Angeles. *Id.* at 5a-6a, 28a.

Once the Commissioner had approved the list of transferees, Customs sent petitioner a letter informing him of the transfer. Pet. App. 5a-6a. As was the case with similar letters sent to other transferred agents of retirement age, an attachment explained petitioner's retirement benefits, should he choose to decline the transfer. *Id.* at 6a, 30a. Petitioner decided to accept the transfer, and signed an employment agreement to that effect in April 2000. *Id.* at 7a.

In May 2000, petitioner attempted to block the transfer by filing a hardship request with Customs's hardship review board. Pet. App. 7a. He asserted that his wife's medical condition required him to stay in Miami where his wife's doctors and family were located. *Ibid.* In response to petitioner's request, Customs informed petitioner that the hardship review board's policy did not permit the filing of a hardship request for the purpose of avoiding a directed transfer. *Id.* at 7a-8a.

In June 2000, petitioner filed a complaint with the Treasury Department's Equal Employment Opportunity (EEO) office. Pet. App. 8a. Petitioner's complaint alleged that his transfer was an act of discrimination based on age, race, and gender, as well as an act of retaliation. *Ibid.* He further alleged that "various Customs Officials" were harassing him due to his previous romantic involvement with Bonni Tischler, who was then Assistant Commissioner for the Office of Investigations. *Id.* at 4a, 8a-9a. In August 2000, petitioner filed a second EEO complaint against Tischler, alleging sexual harassment. *Id.* at 9a.

Although petitioner had been due to report for duty in Los Angeles in July 2000, that report date was postponed by a series of leave requests. Pet. App. 10a. From July 2000 to July 2001, petitioner requested and received a combination of sick leave (due to stress and other medical conditions), annual leave, and family medical leave (to care for his wife). *Id.* at 10a-14a. In May 2001, Customs requested the return of petitioner's service gun, because his extended absence rendered him unable to meet the agency's firearm qualification requirements. *Id.* at 12a-13a. That request prompted petitioner to file another EEO complaint in June 2001. *Id.* at 13a. That complaint alleged that the removal of his gun constituted both gender discrimination and retaliation for the filing of his harassment complaint against Tischler. *Ibid.*

In April 2001, petitioner submitted a second request to the hardship review board, again seeking to avoid the transfer due to his wife's medical condition. Pet. App. 12a. Under a new Customs policy, hardship could be a basis for blocking a direct reassignment, but only in "extreme circumstances." *Ibid.* A physician with the

Law Enforcement Medical Programs concluded that petitioner's wife was able to relocate, that the relocation would not be life-threatening, and that there was no compelling medical evidence to indicate that her condition would be worsened by the move. *Id.* at 14a. In October 2001, petitioner received a letter informing him that the board had denied his hardship request. *Ibid.*

Petitioner reported for duty in Los Angeles in October 2001. Pet. App. 14a-15a. According to petitioner, his duties there were significantly diminished. *Id.* at 15a. Petitioner worked in Los Angeles for approximately one month before taking his remaining leave and retiring permanently. *Ibid.*

2. On February 27, 2002, petitioner and six other plaintiffs filed suit in the Middle District of Florida, claiming discrimination and retaliation in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Pet. App. 16a. After the other plaintiffs settled their claims, petitioner and the government consented to a non-jury trial before a magistrate judge on petitioner's claims of discrimination and retaliation. *Ibid.*

After a bench trial, the magistrate judge entered judgment against petitioner. Pet. App. 3a-41a. The magistrate judge rejected petitioner's claim that his transfer constituted discrimination in violation of the ADEA for two reasons. First, the magistrate judge concluded that the transfer did not amount to an adverse employment action or constructive discharge. *Id.* at 18a-27a. In reaching that conclusion, the magistrate judge noted that petitioner's personal circumstances regarding his wife's medical condition were irrelevant to whether his working conditions were objectively intolerable. *Id.* at 24a-25a. Second, the court found that the

transfer had been motivated by legitimate non-discriminatory reasons, and that petitioner had failed to prove any discriminatory intent. *Id.* at 27a.

The magistrate judge also found no merit in petitioner's claim that he had been constructively discharged in retaliation for his EEO complaints. Pet. App. 33a-41a. The magistrate judge found that the working conditions in Los Angeles were not objectively intolerable, and thus did not amount to a constructive discharge. *Id.* at 36a. In reaching that conclusion, the magistrate judge again rejected petitioner's suggestion that his own personal circumstances could provide a basis for finding objectively intolerable working conditions. *Id.* at 37a. The magistrate judge then went on to "reject the retaliation claim on the separate ground that [petitioner] has failed to prove a retaliatory animus." *Id.* at 38a.[1]

3. In an unpublished, per curiam opinion, the court of appeals unanimously affirmed the magistrate judge's judgment. Pet. App. 1a-2a. The court determined that the magistrate judge's "findings of fact are amply supported by the evidence and conclusions of law drawn therefrom are not erroneous." *Ibid.*

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[1] Petitioner's post-trial memorandum mentioned in passing three alleged retaliatory acts besides the alleged constructive discharge: retrieving his gun, administering various physical and psychological exams to establish his fitness for duty at the end of his year-long leave, and providing him with an unreasonably short time in which to report for duty in Los Angeles. Pet. App. 34a-35a & n.22. Despite oral and written warnings from the court, petitioner failed to develop those theories in the body of the memorandum, and the court deemed them to be forfeited. *Id.* at 34a-35a. The court noted that the three claims were, in any event, "meritless, if not frivolous." *Id.* at 35a n.22.

ARGUMENT

Petitioner contends (Pet. 8-9) that the Court should vacate the court of appeals' judgment and remand for reconsideration in light of *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). That contention should be rejected and the petition should be denied.

Petitioner relies (Pet. 9) on *Burlington Northern's* holding that "[w]hether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." 126 S. Ct. at 2417 (citation and internal quotation marks omitted). But even assuming that *Burlington Northern* "undermined" (Pet. 8) the magistrate judge's finding that petitioner did not suffer a materially adverse action, it fails to provide a basis for overturning the judgment below. In rejecting petitioner's claims, the magistrate judge not only found that petitioner failed to show that his transfer constituted a materially adverse action. As an independent ground for his decision, the magistrate judge also found that petitioner failed to prove either a discriminatory or a retaliatory motive. See Pet. App. 27a, 38a. The court of appeals determined that the magistrate judge's findings were "amply supported by the evidence." *Id.* at 2a. And petitioner has not challenged those findings in this Court.

Moreover, nothing in *Burlington Northern* affects the validity of that separate and independent basis for rejecting petitioner's claims. *Burlington Northern* addressed only the standard for proving a materially adverse action; it did not address the standard for proving

a discriminatory or retaliatory motive. Because the magistrate judge's findings that petitioner failed to prove a discriminatory or retaliatory motive provide an independent basis supporting the judgment below, and that basis for the judgment is unaffected by *Burlington Northern*, there is no reason to vacate and remand for reconsideration in light of *Burlington Northern*.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2006

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[2] Because of the magistrate judge's unchallenged finding of the absence of retaliatory motive, there is also no need to consider whether the ADEA's federal sector provision, 29 U.S.C. 633a, constitutes a waiver of sovereign immunity with respect to retaliation claims. The lower courts are in disagreement on that issue. Compare *Gomez-Perez* v. *Potter*, No. 03-2236, 2006 WL 488060 at *10 (D.P.R. Feb. 28, 2006) (concluding that Section 633a does not waive sovereign immunity for retaliation claims), *Whitman* v. *Mineta*, 382 F. Supp. 2d 1130, 1136 (D. Alaska 2005) (same), and *Cyr* v. *Perry*, 301 F. Supp. 2d 527, 535 (E.D. Va. 2004) (same), with *Forman* v. *Small*, 271 F.3d 285, 298-299 (D.C. Cir. 2001) (concluding Section 633a does waive immunity to retaliation claims), cert. denied, 536 U.S. 958 (2002).